No. 15-674

In the
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS
v.
STATE OF TEXAS, *ET AL.*,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Respondents

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a State has Article III standing and a justiciable cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. 500 *et seq.*, to challenge Petitioners' grant of lawful presence and work authorization in the United States to an estimated 4.3 million illegal immigrants under the "Deferred Action for Parents of Americans and Lawful Permanent Residents" ("DAPA") program because DAPA will lead to more illegal immigrants using State resources and competing with American workers.

2. Whether the DAPA program is arbitrary and capricious, *ultra vires*, or otherwise not in accordance with law.

3. Whether the DAPA program was subject to the APA's notice-and-comment procedures.

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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Arizona v. Intertribal Tribal Council of Arizona*, 133 S. Ct. 2247 (2013); *Arizona v. United States*, 132 S. Ct. 2492 (2012); and *Horne v. Flores*, 557 U.S. 433, 461 n. 10 (2009) (*citing* AULDF's *amici* brief).

AULDF supports the Respondents' arguments and agrees with its reasons for opposing the Petition. AULDF writes separately to discuss the effect of the proposed federal "Deferred Action" policy on American workers, historically recognized by Congress and this Court as an important part of immigration law and policy, but not adequately treated in the Petition. In particular, AULDF raises *INS v. Nat'l Ctr. for Immigrants' Rights* ("*NCIR*"), 502 U.S. 183 (1991), which reviewed the Attorney General's power to issue a "no work" condition on the release of illegal immigrants.

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[1] Pursuant to Rule 37.2, amicus certifies that counsel of record for all parties received notice of its intention to file this brief more than ten days prior to its due date, and have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA") would grant work authorization to 38% of all illegal immigrants estimated to live in the United States. One major purpose of immigration law has always been to protect American workers against such competition. The most recent comprehensive legislation regarding work authorization is the 1986 Immigration Reform and Control Act ("IRCA"), which was intended to "forcefully" combat illegal immigration through restrictions on the employment of illegal immigrants. Given Congress's specific intention to combat employment of illegal immigrants, it is highly unlikely that Congress would have intended the 1986 Act to authorize *sotto voce* blanket granting work authorization to millions of illegal immigrants.

Yet the Petition largely ignores both Congressional intent and many precedents that would protect American workers from such competition. For example, the Petition doesn't mention *INS v. Nat'l Ctr. for Immigrants' Rights* ("*NCIR*"), 502 U.S. 183 (1991), where this Court reviewed the Attorney General's power to issue a "no work" condition on the release of illegal immigrants. Indeed, the Petition relies on 8 U.S.C. § 1324a, the IRCA-enacted employment prohibition the *NCIR* Court found supported the Attorney General's refusal to grant work authorization to aliens awaiting immigration proceedings.

In light of Congressional intent and the several cases in which this Court has narrowly construed work authorization, the Petition should be

denied. If work authorization is to be granted to millions of illegal immigrants, that choice should be made by Congress, not by an agency which didn't even conduct a regulatory review process.

ARGUMENT

"Deferred Action for Parents of Americans and Lawful Permanent Residents" ("DAPA")[2] is, at bottom, a jobs program. DAPA would grant work authorization to more than a third of illegal immigrants estimated to reside in the United States.[3]

Other explanations of the purpose of the DAPA program, as a practical matter, are less immediate. For example, despite Petitioners' description of the program as a means to avoid removal,[4] there is at present so little actual immigration law enforcement that any fear is unjustified.[5] As the court below found: "The total

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[2] Petition Appendix ("Pet. App.") at 4a n. 10.

[3] As the court below noted, there are 11.3 million illegal immigrants estimated to reside in the United States, and 4.3 million of them (or 38% of the estimated population) would be eligible for DAPA status. Pet. App. 5a-6a.

[4] Petition ("Pet.") at 3.

[5] "Because of policies implemented by the Obama Administration, the vast majority of illegal aliens – including criminal aliens – residing in the interior of the country face no threat of deportation." Comm. on the Judiciary, "Oversight of the Administration's Criminal Alien Removal Policies," Dec. 2, 2015, Statement of Jessica Vaughn, Center for Immigration Studies, P. 1, http://www.judiciary.senate.gov/imo/media/doc/12-02-15%20Vaughan%20Testimony.pdf.

number of deportations is at its lowest level since the mid-1970's."[6]

Similarly, Petitioners' explanation of the program as a reaction to underfunding[7] is both irrelevant, as noted by the court below,[8] and contradicted by the fact that the agency itself admitted at a recent Senate Judiciary Committee meeting that it couldn't find enough illegal immigrants to deport and therefore transferred $113 million to other non-immigration programs.[9]

As Circuit Judge King pointed out in dissent below: "The DAPA Memorandum has three primary objectives for these aliens: (1) to permit them to be lawfully employed ..." Pet. App. 91a (King, J.,

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[6] Pet. App. 52a, *citing,* U.S. Dep't of Homeland Sec., 2013 YEARBOOK OF IMMIGRATION STATISTICS 103, tbl. 39 (2014), http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.

[7] Pet. at 4.

[8] Pet. App. 82a-83a n. 197 ("But the adequacy or insufficiency of legislative appropriations is not relevant to whether DHS has statutory authority to implement DAPA. Neither our nor the dissent's reasoning hinges on the budgetary feasibility of a more thorough enforcement of the immigration laws; instead, our conclusion turns on whether the INA gives DHS the power to create and implement a sweeping class-wide rule changing the immigration status of the affected aliens without full notice-and-comment rule-making, especially where—as here—the directive is flatly contrary to the statutory text.").

[9] Stephen Dinan, "ICE gives away $113 million, says not enough illegal immigrants to deport," *The Washington Times*, December 2, 2015, A1, http://www.washingtontimes.com/news/2015/dec/2/ice-gives-away-113-million-says-not-enough-illegal.

dissenting). The District Court below noted "the Executive Branch's intent that deferred action recipients work while they remain in the United States."[10] Indeed, the Petition repeatedly cites 8 U.S.C. § 1324a – titled "Unlawful Employment of Aliens" – as authority for permitting illegal immigrants to work under DAPA,[11] while ignoring the abundant precedent indicating that Congress intended exactly the opposite result.[12]

Instead, Petitioners argue that "work authorization will make these individuals more likely to be self-reliant and pay taxes, and less likely to harm American workers by working for below-market wages."[13] That assertion – "less likely to harm American workers" – is one of only a handful of acknowledgements in the Petition of a critical issue in this case: whether DAPA respects both Congress's express protections and this Court's historical concern for American workers.

The Petition, for example, completely ignores *INS v. Nat'l Ctr. for Immigrants' Rights* ("*NCIR*"), 502 U.S. 183 (1991), which directly addressed the grant of work authorization to illegal immigrants

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[10] Pet. App. at 277a.

[11] Pet., 5, 13, 22, 22 n. 3, 28.

[12] "[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended". H.R. Rep. 104-725 (1996), at 383 (Conf. Rep.).

[13] Pet., 28.

whose removal had been stayed.[14] "The stated and actual purpose of no-work bond conditions was 'to protect against the displacement of workers in the United States.'"[15]

Because *NCIR* permitted the Attorney General to exercise discretion not to grant work authorization to aliens awaiting immigration proceedings, one might expect that Petitioners would cite it in support of the discretion to grant the reverse. But the Petition did not, perhaps because *NCIR* recognized Congress's intent to "forcefully" combat illegal immigration through restrictions on the employment of illegal immigrants while they are awaiting immigration proceedings. *NCIR*, 502 U.S. at 194 and n. 8.

By adopting DAPA without respecting contrary Congressional intent, Petitioners ignored both procedural and substantive limits on their authority. The Petition should be denied and the injunction at issue allowed to remain in place.

I. DAPA UNDERMINES CONGRESS'S GOAL OF PROTECTING AMERICAN WORKERS.

Congress's power over immigration is plenary. *Fiallo v. Bell*, 430 U.S. 787, 792 (1997). "Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . ." *Galvan v. Press*, 347 U. S. 522, 531 (1954). As the District Court below noted: "It is

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[14] *NCIR* was not mentioned, reversed or limited in *Arizona v. United States*, 132 S.Ct. 2492 (2012) (certain state laws regulating immigrants preempted by federal law).

[15] *NCIR*, 502 U.S. at 194, *quoting*, 48 FED. REG. 51142 (1983).

Congress, and Congress alone, who has the power under the Constitution to legislate in the field of immigration." Pet. App. 335a, *citing*, *Plyler v. Doe*, 457 U.S. 202, 237-38 (1982), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 596-97 (1952) ("matters solely for the responsibility of the Congress").

A primary purpose of the immigration statutes is to "preserve jobs for American workers." *INS v. Nat'l Ctr. for Immigrants' Rights* ("*NCIR*"), 502 U.S. 183, 194 (1991); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984). One of the "great purposes was to protect American labor against the influx of foreign labor." *Karnuth v. United States*, 279 U.S. 231, 244 (1929).

Justice Brennan, writing for the Court in *De Canas v. Bica*, 424 U.S. 351 (1976), said:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.

De Canas, 424 U.S. at 356-57.[16]

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[16] *See also*, Judge Wake's unreported opinion in *Ariz. Contractors Ass'n v. Napolitano*, 2007 WL 4570303, *6, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW (D. Ariz. Dec. 21, 2007) (emphasis added), one of the original trial court rulings in the case that became *U.S. Chamber of Commerce v. Whiting*, No. 90-115, 131 S.Ct. 1968 (2011), here:

In 1986, Congress added new immigration law enforcement mechanisms in the Immigration Reform and Control Act ("IRCA").[17] Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U. S. 137, 147 (2002).

The Senate Judiciary Committee summarized IRCA's "Purpose" in one sentence: "The Committee bill is intended to increase control over illegal immigration."[18] In terms relevant to this case in

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> People disagree whether the great number and continuing flow of unauthorized workers into the United States has more benefits than costs. But no one can disagree that the costs and benefits accrue differently to different people in our society. **It is the responsibility of our elected representatives in Congress and in our legislatures to strike the balance among those competing social and economic interests**. . . . The balance now struck is in favor of an economy for those who may work in the United States. *See Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9th Cir. 2007) . . . The benefits in fact to those who come to this country against the law to make better lives for themselves, to those who save from lower cost labor and general depression of wages from employing unauthorized aliens, and to those who enjoy the products of unauthorized labor at lower prices, do not count. The beneficiaries chosen identically by federal and Arizona law prevail over all who benefit from unauthorized alien labor.

[17] Immigration Reform and Control Act of 1986, Pub.L. 99-603, 100 Stat. 3359.

[18] S. Rep. 99-132, at 1. Congress continued to "increase control" in 1996, by increasing penalties for harboring illegal immigrants to include lengthy prison terms and, in some cases, possibly the death penalty. 8 U.S.C. § 1324(a)(1)(B); Illegal

particular, the Senate report noted: "The **major purpose** of this bill is to make progress toward the day when the American people can be assured that the limitations and selection criteria contained in the immigration statutes are **actually implemented through adequate enforcement.**"[19] The House Report noted that Congress's purpose was to provide a statutory scheme of penalties as a means "to curtail[] future illegal immigration[.]"[20]

In the long line of *NCIR* cases, the issue of how much enforcement Congress intended was placed directly before the Court. Ultimately, the *NCIR* Court reversed a Ninth Circuit opinion that said that, by enacting IRCA, Congress intended a "tempered enforcement policy"; instead the Court noted that Congress intended IRCA to enhance "forceful" immigration law enforcement to prevent illegal immigrants from working while awaiting immigration proceedings.[21]

Before the passage of IRCA, the Ninth Circuit had rejected a "no-work" bond condition for illegal immigrants released pending immigration proceedings because of the Immigration and Nationality Act of 1952's purported "peripheral concern ... with the employment of illegal aliens."[22]

Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 (1996).

[19] S. Rep. 99-132, at 3 (emphasis added).

[20] H.R. Rep. No. 99-682(I), at 46.

[21] *NCIR*, 502 U.S. at 194 and n. 8; *accord*, *Reno v. Flores*, 507 U.S. 292, 334 (1993)(upholding detention of unaccompanied minor illegal immigrants).

[22] *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 791 F.2d 1351, 1356 (9th Cir. 1986).

This Court vacated and remanded that decision for review in light of the then-new IRCA.[23]

On remand, the Ninth Circuit asked whether the Attorney General's "no-work" regulations were founded on "considerations rationally related to the statute he is administering."[24] It compared IRCA to the Internal Security Act of 1950.[25] The Ninth Circuit then answered its own question in the negative: IRCA "states a **tempered enforcement policy** qualitatively different from the sweeping concerns with subversion of the Internal Security Act."[26]

The Ninth Circuit next said "While the INS argues that the authority to detain aliens is consistent with the goals and objectives of IRCA, the legislative history reveals otherwise. The regulation disrupts the **careful balance** which Congress achieved in IRCA." *NCIR*, 913 F.2d at 1367-68 (emphasis added). "The emphasis on the rights of aliens as well as citizens shows a concern for fair and humane enforcement of the immigration laws which is at odds with the ... **harsh and inhumane measures**[27] at issue here."[28] It struck the regulation

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[23] *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 481 U.S. 1009 (1987).

[24] *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1360 (9th Cir. 1990), *rev'd*, 502 U.S. 183 (1991).

[25] *Id.*, 913 F.2d at 1360-61.

[26] *Id.*, 913 F.2d at 1366 (emphasis added).

[27] The "harsh and inhumane measures" referred to by the Ninth Circuit were the "no-work" bond conditions imposed in individualized determinations on illegal immigrants awaiting immigration proceedings. 913 F.2d at 1369.

as not rationally-related to the purposes of the INA after IRCA.[29]

The United States sought review of the Ninth Circuit's opinion, noting that "while IRCA constituted a carefully crafted compromise designed to take *new* steps to prevent illegal employment of aliens, the statute made no effort to modify existing provisions of the immigration laws, or to eliminate any steps available under those existing provisions to curb unlawful employment."[30]

The Court accepted certiorari, limited to the question of whether the "no work" bond regulation was authorized by statute.[31] The Court unanimously rejected the panel majority's interpretation, reversed and remanded the case.[32]

The Court first recounted the history of the case, rejecting the original *NCIR* panel's characterization by saying that the passage of IRCA had "cast serious doubt on the Court of Appeals' conclusion that employment of undocumented aliens was only a 'peripheral concern' of the immigration laws."[33]

The Court likewise rejected the Ninth Circuit's analogy to the Internal Security Act of

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[28] *Id.*, 913 F.2d at 1369 (emphasis added).

[29] *Id.*

[30] Appellate Petition, *INS v. Nat'l Ctr. for Immigrants' Rights*, No. 90-1090, 1991 WL 11009301, at 8 n. 8 (emphasis in original).

[31] *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 499 U.S. 946 (1991).

[32] *NCIR*, 502 U.S. at 188, 196.

[33] *Id.*, 502 U.S. at 187.

1950.[34] Instead, the *NCIR* Court noted that the "stated and actual purpose of no-work bond conditions was 'to protect against the displacement of workers in the United States.' ... We have often recognized that a primary purpose in restricting immigration is to preserve jobs for American workers."[35]

In a footnote, the Court rejected the Ninth Circuit's belief that IRCA permitted only a "tempered enforcement policy." "This policy of immigration ["safeguards for American labor"] was **forcefully** recognized most recently in the IRCA." *NCIR,* 502 U.S. at 194, n. 8 (emphasis added). "The contested regulation is wholly consistent with this established concern of immigration law, and thus squarely within the scope of the Attorney General's statutory authority." *NCIR,* 502 U.S. at 194.

In IRCA, Congress has struck a "careful balance ... with respect to unauthorized employment." *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012). The question in this case is whether Petitioners may strike that balance in a different place, especially when their purpose appears to be benefits to the aliens involved, rather than concern for American workers, as Congress intended in IRCA.

The Secretary took none of the steps necessary to effectuate a legislative rule when he promulgated the DAPA memoranda. Even if he had tried to issue a legislative rule, the Secretary does not have the authority to decide not to enforce the

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[34] *Id.*, 502 U.S. at 193.

[35] *Id.*, 502 U.S. at 194.

immigration laws. *See, Lousiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986) ("An agency may not confer power upon itself.").

This Court should not credit an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), *quoting, American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Similarly, while reviewing courts should uphold an agency's reasonable and defensible constructions of its enabling statute, they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id., quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

Congress has long said that illegal immigrants, as a class, should not work in the United States. Petitioners do not have the discretion to allow 38% of illegal immigrants to work.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to deny the Petition.

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